

EX PARTE OR LATE FILED



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August 10, 1998

Michelle Carey
Policy Division -- Room 544
Common Carrier Bureau
Federal Communications Commission
Washington D.C. 20554

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Re: **EX PARTE** in Application of WorldCom, Inc. and MCI Communications Commission, CC Docket No. 97-211

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Dear Ms. Carey:

On August 7, 1998, Jonathan B. Sallet, Chief Policy Counsel of MCI, Don Elardo of MCI, and Michael Fleming of Swidler and Berlin met via telephone with yourself, Michael Pryor, Don Stockdale and other staff members of the Common Carrier Bureau. At that meeting, MCI expressed the view that MCI's agreement to sell internetMCI to Cable & Wireless plc, and, specifically, the portion of the agreement relating to lease of transmission capacity, constituted "private carriage". As a result, MCI's commitment to lease transmission capacity specifically to support the Internet business MCI is selling to C&W is not subject to common carrier tariffing obligations. Below is a short primer on the distinction between common carriage and private carriage.

Common carriage is defined as holding oneself out to serve indifferently all potential users. National Association of Regulatory Commissioners v. FCC, 533 F.2d 601, 608-09 (D.C. Cir. 1976) ("NARUC II"). Common carriers are subject to the tariffing requirements of Sections 201-205 of the Act, although dominant and nondominant carriers are treated differently. Among other sections of the Act, common carriers are also subject to Section 214, although only dominant carriers currently are subject to Section 214 filing requirements.

"Whether an entity in a given case is to be considered a common carrier or a private carrier turns on the particular practice under surveillance. If the carrier chooses its clients on an individual basis and determines in each particular case 'whether and on what terms to serve' and there is no specific regulatory compulsion to serve all indifferently, the entity is a private carrier for that particular service and the Commission is not at liberty to subject the entity to regulation as a common carrier." Southwestern Bell Telephone Company v. FCC, 19 F.3d 1475 (D.C. 1994) (citing NARUC II and National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630, 643 (D.C. Cir), cert. denied 425 U.S. 992 (1976) ("NARUC I").

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In the Dark Fiber case at issue in Southwestern Bell Telephone Company v. FCC, the Court found that individual case basis tariffs to end user customers did not compel a finding by the FCC that incumbent local exchange carriers were engaged (or preparing to engage) in common carriage. Id. In NorLight, the Commission granted a Petition for Declaratory Ruling asking that NorLight be declared a private carrier, finding that (1) there was plenty of transmission capacity available in the industry to satisfy the needs of carriers or end users who wanted to lease fiber capacity; (2) as a nondominant carrier, NorLight lacked any market power with respect to transmission capacity, (3) NorLight would engage in customer-specific negotiations resulting in contracts tailored to individual customer needs, (4) the customers were sophisticated and could ably represent their own interests in negotiations, and (5) the contracts would be long-term in nature. NorLight, 2 FCC Rcd 132 (1987), aff'd 2 FCC Rcd 5167 (1987). See also Public Service Company of Oklahoma Request for Declaratory Ruling, 3 FCC Rcd 2327, 2329 (1988)(irrelevant for private carriage analysis that the service at issue is substitutable for one offered by common carriers).

Private carriage is a matter of contract law, and does not require the filing of tariffs under Title II of the Communications Act. Section 211 of the Act provides that the Commission can require carriers to file carrier-to-carrier contracts. The Commission has forborne from requiring nondominant carriers from filing contracts under Section 211 of the Act. Amendment of Sections 43.51, 43.52, 43.53, 43.54, and 43.74 of the Commission's Rules To Eliminate Certain Reporting Requirements, 1 FCC Rcd 933 (1986).

Sincerely,


Mary L. Brown

cc: Don Stockdale
Michael Pryor